Supreme Court, U.S.
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No. 93-994

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CONTINENTAL POTASH INC. and
CROSS LABORATORIES, INC.,
Petitioners,

v.

FREEPORT-MCMORAN, INC., FREEPORT MINERALS CO.,
and NATIONAL POTASH CO.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New Mexico

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BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Supremacy Clause is properly invoked by private parties in a case where it was never alleged that the federal government's regulatory or proprietary functions were affected.

2. Whether the United States Supreme Court has jurisdiction to entertain a petition for certiorari in a case where the petitioners asserted the existence of a federal question for the first time in a motion for rehearing in the Supreme Court of New Mexico.

3. Whether the United States Supreme Court has jurisdiction to entertain a petition for certiorari in a case where the petition was not filed for more than four months after a motion for rehearing in the State Supreme Court was denied.

PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of all parties.

Freeport-McMoRan, Inc. is the corporate successor of Freeport Minerals Co. Freeport Minerals Co. was the corporate parent of National Potash Co. while National Potash Co. was vital. All the shares of National Potash Co. were assigned to a third party in the early 1980s, with Freeport-McMoRan, Inc. retaining all liabilities and obligations accruing prior to the date of the assignment.

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BRIEF OF RESPONDENTS IN OPPOSITION

SUMMARY OF ARGUMENT

The parties to this litigation are private business concerns. They entered into a contract in which the petitioners assigned federal prospecting permits and mineral leases to Freeport.[1] In the contract, the petitioners expressly agreed that, as between them, Freeport would have the unilateral right to determine which ore it would mine and which ore it would leave unmined. Freeport was the direct mineral lessee of the United States. The

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[1] For purposes of convenience, we shall refer to the respondents, collectively, as "Freeport."

federal leases imposed specific duties on Freeport, duties Freeport owed to the United States. The federal leases remained unamended and were fully enforceable by the government at all relevant times.

The issues in this lawsuit involved only the private contract the petitioners had with Freeport. The questions addressed by the Supreme Court of New Mexico were purely questions of New Mexico law, i.e., the law of contract and contractual construction. The United States was not a party to this litigation and its interests were never involved.

The petition for certiorari represents an attempt to make a private contractual dispute appear to be one involving the federal government and federal interests. There is no question of law at issue that justifies the granting of a writ of certiorari.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THERE IS NO FEDERAL QUESTION IN THIS CASE

In *Equitable Life Assurance Soc'y v. Brown*, 187 U.S. 308 (1902), the Court said ". . . not every mere allegation of a Federal question will suffice to give jurisdiction. 'There must be a real substantial question on which the case may be made to turn,' that is, a real, and not a merely formal, Federal question is essential to the jurisdiction of the Court." 187 U.S. at 311 (citing *City of New Orleans v. New Orleans Water-Works Co.*, 142 U.S. 79 (1891)).

This is a case in which there has never been a federal question. Accordingly, this Court lacks jurisdiction to entertain the petition for certiorari. *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816); *Murdock v. City of Memphis*, 87 U.S. 590 (1874).

Counterstatement of the Case

In the 1940s, two closely-held corporations, Continental Potash Company and Cross Laboratories, Inc., held a number of federal prospecting permits pertaining to land in southeastern New Mexico. The land contained substantial deposits of potash, a material used in the manufacture of fertilizer. Neither Continental nor Cross had the wherewithal to construct or operate a potash mine. Accordingly, they entered into a contract with Freeport. The contract provided that the prospecting permits would be assigned to Freeport, who would then obtain federal mineral leases from the government and decide whether to construct and operate a mine. If Freeport decided to proceed, and actually did mine potash, it agreed to pay the petitioners an eight percent royalty on whatever cumulative net profits might result from its efforts. (Pet. A5-6).

The parties agreed that decisions relating to the operation of the mine would be left to Freeport alone:

> ". . . the nature and extent of all work done by Freeport on the mining lands and the time and manner of doing the same shall rest in the sole judgment and discretion of Freeport"

The contract also stated that:

> "subject to the requirements of the leases, the nature and extent of all exploration, development and mining operations and the time and manner of performing the same shall be as Freeport in its sole judgment and discretion shall determine and Freeport shall have the right at all times to determine the quantity of ore to be mined and what ore is to be left unmined . . ."

The petitioners had no ownership interest in the mineral bearing lands. They were simply net profits royalty holders whose rights were set out in a written contract with Freeport. (Pet. A5-7). Nothing in the contract

affected the independent interests, rights or powers of the United States.

Freeport also owed responsibilities to the government, as provided in the mineral leases and the relevant federal statutes and regulations. Thus, Freeport had two different legal relationships, with different entities. One relationship, with the petitioners, was governed by a contract. The other, with the United States, was governed by a cluster of federal mineral leases and various federal statutes and regulations. The United States was not dependent on the private net profits royalty holders to enforce its rights. Indeed, the government had no relationship with the net profits royalty holders of any kind. (Pet. A6).

That the government's rights affecting Freeport's operation of the leases were more encompassing than those of the private royalty holders is undeniable. The federal leases specifically gave the United States the power to halt mining operations if it believed Freeport was committing economic waste, such as by "highgrading." The United States also had the power to cancel the mineral leases if it felt Freeport breached its obligations. 30 U.S.C. § 188; *see Dawn Mining Co. v. Watt*, 543 F. Supp. 841 (D.C. D.C. 1982), aff'd, 704 F.2d 1293 (D.C. Cir. 1983).

The petitioners' lawsuit sounded in contract. The government was not a party. The petitioners did not contend (as they do now) that they represented the interests of the United States in "enforcing federal anti-waste provisos incorporated into the contract of assignment." (Pet. 15). They contended only that the operative provisions of the government's leases were part of their private contract. (Pet. J1-2; K1). The trial judge eventually held that the terms of the federal mineral leases were incorporated by reference in the private contract. (Pet. M-7). At trial, however, the question for the jury, as posited by the court, was whether Freeport had breached

some alleged implied contractual covenants. (Pet. A2; L).

Accordingly, the question of contract interpretation before the Supreme Court of New Mexico was whether this private contract contained implied covenants. Employing principles of contractual construction which are by no means unique to New Mexico jurisprudence, the court concluded that the contract was too specific in its language to admit of the alleged implied covenants. (Pet. A30-39).

The New Mexico court pointed out that the United States, as Freeport's lessor, could have brought an action for waste if it believed there were grounds for doing so. (Pet. A38-39). But the court also made it absolutely clear that this case involved only the rights and duties of the parties before it, rights and duties which were governed by state law.

In *City of New Orleans v. New Orleans Water-Works Co.*, this Court held that "the bare averment of a federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay." 142 U.S. at 87.

The petitioners cannot make a purely private contract become an instrument of federal importance.

II. THE NEW MEXICO COURT'S JUDGMENT RESTS SOLELY ON NONFEDERAL GROUND

The Supreme Court has no jurisdiction to review a state court judgment resting on an adequate non-federal ground. *Herb v. Pitcairn*, 324 U.S. 117 (1945). If the state court decides only non-federal questions, or decides both federal and non-federal questions, the Supreme Court has no jurisdiction to review if the non-federal

ground is adequate to support the judgment. *New York Times Co. v. Jascalevich*, 439 U.S. 1317 (1978).

Every issue touched upon in the Supreme Court of New Mexico's opinion flows from the private contract. The conclusions reached by the court are summarized at the end of its opinion:

> "In sum, the trial court erred in holding that the breach of contract claims and the fraud claim are not barred by the applicable statutes of limitations. The trial court abused its discretion in tolling the statutes of limitations. The record does not support the trial court's finding of fraudulent concealment nor the application of equitable estoppel to preclude the defendants from asserting the statute of limitations defenses. The trial court also erred as a matter of law in finding and enforcing implied covenants against the defendants."

(Pet. A41-42).

To say that the non-federal ground is adequate to support the judgment is to understate the case. The non-federal ground is the *only* ground of decision. There is no federal issue in the case and, therefore, no federal ground for the New Mexico decision to rest on. The resolution of this dispute did not require or involve analysis of the Mineral Leasing Act of 1920, the terms and conditions of the federal mining leases or the rights and interests of the United States. None of these subjects is addressed in the New Mexico court's decision.

Petitioners' Authorities Distinguished

The petitioners cite a number of cases dealing with inapposite situations. They begin with *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979). In that case, a California county was not permitted to enforce its zoning ordinances controlling oil and gas exploration on federal lands. No one in the case at bar tried to prevent the federal government from exercising its right to regulate Freeport's mining operations.

The petitioners next argue that unless the New Mexico judgment is overturned, there will be a hodge-podge of decisions affecting mining operations on federal leaseholds, with no uniform rule to follow. The case they cite, *Lowey v. Watt*, 684 F.2d 957 (D.C. Cir. 1982) dealt with the BLM's authority to administer the Oil and Gas Leasing Program under the Mineral Leasing Act of 1920. The court in *Lowey* distinguished the case before it from *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63 (1966). The point made by the *Lowey* court is directly applicable here:

> "*Wallis* was a diversity case, a contract dispute between two private parties of no concern to the federal government except for the fact that their dispute involved a federal lease. These cases, in contrast, arise on petitions for review of administrative decisions; the duties of federal officials in administering the noncompetitive leasing program are directly in issue."

684 F.2d at 966.

There is no danger of lack of uniformity. The New Mexico court makes it clear that it is only construing the terms of a contract between a mining company and some private net profits royalty holders. Nothing in the court's decision is binding on the United States or in any way affects the United States in the administration of its mineral leasing program. The court even reminds the reader that the rights of the United States are separate, distinct and fully enforceable.

In *Wallis v. Pan Am. Petroleum Corp.*, the question before this Court was whether a contract dispute between private parties dealing with a federal lease was governed by federal or state law. The Court said:

> We find nothing in the Mineral Leasing Act of 1920 expressing policies inconsistent with state law in the area that concerns us here. In providing for develop-

> ment of public domain lands containing minerals, the Act comprehensively regulates various aspects of the process. For example, it governs issuance of leases among competing applicants, e.g., § 17(b), (c), 30 U.S.C. § 226(b), (c); it controls in some measure the actual use of the leased tract, to promote goals such as conservation and safety, e.g., § 30, 30 U.S.C. § 187; and it deals with rent and royalty payments to be made to the Government, e.g., § 17(d), 30 U.S.C. § 226(d). Few provisions lend themselves at all to the creation of a federal law of the rights *inter se* of private parties dealing in the leases.

384 U.S. at 69.

The Court went on to say this:

> Finally, it is said that because the leases are issued by the United States and concern federal lands, there is a federal interest in having private disputes over them justly resolved. Apart from the highly abstract nature of this interest, there has been no showing that state law is not adequate to achieve it.

384 U.S. at 70-71. Also *see Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900) (a suit by adverse claimants for a patent under the federal mining law is not a suit arising under the laws of the United States in such a way as to confer jurisdiction on a federal court).

The petitioners mischaracterize the New Mexico decision when they say it "sanctions mining practices forbidden by federal law." (Pet. 19). The decision does not sanction anything. It interprets a contract. In that contract, private royalty holders, who did not have an ownership interest in the mineral bearing lands or the minerals themselves, agreed that they would have no participation at all insofar as mining decisions were concerned. By contrast, the United States, as lessor, retained significant prerogatives regarding the conduct of operations by its lessee.

The court did not "fail to recognize a private cause of action for highgrading." (Pet. 19). Whether a given litigant can seek damages for highgrading depends on the nature of its relationship with the mining company and the terms of its contract. The federal leases gave the United States such a cause of action. The petitioners' contract did not.[2]

United States v. Ruzicka, 329 U.S. 287 (1946) is cited for the argument that the ruling below "significantly impedes administration of the mineral leasing program." (Pet. 23) The question before this Court in *Ruzicka* was whether a handler of milk could resist a claim against him by the Secretary of Agriculture, made according to procedures defined in the Agricultural Marketing Agreement Act of 1937, without previously having sought to challenge the claim in a proceeding before the Secretary. *Ruzicka* has nothing to do with any issue in this case, real or imagined.

The petitioners cite *Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296 (1946) as supporting the argument that the ruling of the New Mexico court "stands as a serious hinderance to effective administration of the law." *Rothensies* dealt with a technical accounting question in the tax law. It is hard to imagine a case having less to do with the issues resolved by the Supreme Court of New Mexico.

Petitioners claim that *Morton v. Ruiz*, 415 U.S. 199 (1974) points up how the decision of the New Mexico court "is at odds with well established construction of the Mineral Leasing Act by the Secretary of the Interior." In *Morton v. Ruiz*, this Court held that general assistance

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[2] The court did not hold that "highgrading is beneficial." It merely pointed out, in *dicta*, that the holder of a net profits royalty is benefitted whenever the miner pursues a program aimed at generating a profit. It was the court's way of distinguishing the positions held by the holder of a net profits royalty and the owner/lessor of the mineral estate. (Petition for Certiorari, A 38-39)

benefits are available to Indians if they live near their reservation and maintain close economic and social ties with it. The case has nothing to do with the Mineral Leasing Act.

United States v. Coleman, 390 U.S. 599 (1968) is said to support the contention that the New Mexico court's decision has a "specific impact on the utilization of public lands." In *Coleman*, the litigants were the United States and a party who claimed to have discovered a valuable mineral deposit. The question before the Court was whether the United States was required to convey the land to the claimant. *Coleman* is one of countless examples of how the government looks after its own interests and is not dependent on a private party for that function. *Coleman* and cases like it highlight the lack of a federal question in a case such as this one.

In *United States v. Mitchell*, 463 U.S. 206 (1983), this Court held that the United States is accountable in money damages for alleged breaches of trust in connection with its management of forest resources on allotted lands of the Quinault Indian Reservation. *United States v. Mitchell* has nothing to do with the question of whether federal revenues are affected by the New Mexico court's decision in this contract dispute between non-governmental parties. Since the United States can enforce the terms and conditions of its mineral leases, statutes and administrative regulations, the decision of the New Mexico court has no potential effect on government revenues.[3]

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[3] The government's royalty was not based on Freeport's profitability. It was based solely on the gross production of ore and was paid whether the company made a profit or not. *See* 30 U.S.C. § 282; *United States v. Southwest Potash Corp.*, 352 F.2d 113 (10th Cir. 1965).

III. THE PETITION FOR CERTIORARI IS PROCEDURALLY DEFECTIVE

A. The Petitioners Raised the Purported Federal Question Too Late to Confer Jurisdiction on This Court

If there is a true federal question, it must be raised and decided at the trial level to be preserved for Supreme Court review. If both of these do not appear on the record, appellate jurisdiction fails. *Cardinale v. Louisiana*, 394 U.S. 437 (1969); *Owings v. Norwood's Lessee*, 5 Cranch 344 (1809). If the alleged federal question was only tangentially involved below, the Supreme Court lacks jurisdiction to entertain a petition for certiorari. *Garrity v. State of New Jersey*, 385 U.S. 493 (1967); also see 28 U.S.C. § 1257 and S. Ct. R. 14(h).

At trial, the petitioners contended that their contract with Freeport gave them rights and powers normally associated with ownership of the mineral estate, i.e. rights and powers identical to those enjoyed by the United States. The petitioners did not contend that they took over the government's regulatory function.

On appeal, the question was what rights and powers the contract gave the petitioners as against Freeport. At no time did the petitioners contend, as they do now, that the interests of the United States were involved. The argument that the government's interests were somehow invaded was introduced to this litigation for the first time in the amended motion for rehearing *en banc*, filed May 24, 1993 in the Supreme Court of New Mexico, after the court's decision had been filed (Pet. F-2). This is too late. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945).[4]

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[4] It is also too late under New Mexico law. *See Ellis v. Citizens' Nat'l Bank of Portales*, 25 N.M. 319, 183 P. 34 (1918); *Mosely v. Magnolia Petroleum Co.*, 45 N.M. 230, 114 P.2d 740 (1941). Thus,

It must appear affirmatively from the record not only that the federal question was presented for decision to the highest court of the state having jurisdiction but that its decision of the federal question was necessary to the determination of the cause. *Honeyman v. Hanan,* 300 U.S. 14 (1937). The opinion filed by the Supreme Court of New Mexico makes it clear that a resolution of the "federal question" advanced now by the petitioners was not necessary to the determination of the case. Obviously, an issue cannot have been necessary for resolution of a case if it was not mentioned by the court and not even raised until after the case was decided.

The argument that the New Mexico court's holding caught the petitioners by surprise is incorrect. Freeport's theory of the case, as argued from the earliest stages, was that the petitioners had no contractual right to demand that any particular mode of mining be followed. The petitioners certainly knew what the effect on their case would be if the state court were to agree with Freeport. If the petitioners truly believed that the government's ability to enforce its leases would somehow be impaired if they lost their private net profits royalty claim, they should have raised the issue in the trial court.. *Herndon v. Georgia,* 295 U.S. 441 (1935).

B. The Petition For Certiorari Was Filed Too Late

Supreme Court Rule 13.4 provides:

> "[I]f a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for hearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment. A suggestion made to a United States court of appeals for a rehearing

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there would be an independent state law ground for rejecting the petitioners' argument even if it had merit.

in banc pursuant to Rule 35(b) Federal Rules of Appellant Procedure, is not a petition for rehearing within the meaning of the Rule."

The relevant chronology in this case is as follows:

Decision of the Court	April 22, 1993
Motion for Rehearing *En Banc*	May 5, 1993
Amended Motion for Rehearing *En Banc* (alleged federal question introduced to the case)	May 24, 1993
Motion for Rehearing Denied	August 10, 1993
Second Motion for Rehearing *En Banc*	August 24, 1993
Second Motion for Rehearing *En Banc* Denied	September 24, 1993
Petition for Certiorari Filed In the United States Supreme Court	December 21, 1993

Supreme Court Rule 13.4 contemplates that a party shall have one bite at the rehearing apple before the time to prepare and file a petition for certiorari begins to run. In this case, the petitioners took their bite on May 5, 1993 and learned the outcome on August 10, 1993. They did not file their petition for certiorari until more than four months later. The time to file the petition expired on November 8, 1993. The petition for certiorari, filed December 21, 1993, came too late to invoke this Court's jurisdiction.

CONCLUSION

The Supreme Court of New Mexico dealt only with issues of state law. It construed a contract between private parties and determined their respective rights and duties pursuant to that contract. The independent rights of the United States were not litigated or affected in any way, at any time. The alleged federal question was not articulated until after the Supreme Court of New Mexico

filed its decision and the petition for certiorari itself was filed unseasonally. It is respectfully submitted that the petitioners have wholly failed to sustain their burden to establish that there are special and important reasons why the writ should be granted.

The petition for certiorari should be denied.

Respectfully submitted,

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